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No. 94-818

In the Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
JUN 19 1995
OFFICE OF THE CLERK

HERCULES INCORPORATED

and

WM. T. THOMPSON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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June 19, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether the government must ultimately bear responsibility for damages resulting from government-mandated production of Agent Orange by private companies pursuant to governmentally-imposed Defense Production Act contracts.

2. Whether the Federal Circuit's limited view of the indemnification provided by Section 707 of the Defense Production Act is fundamentally inconsistent with (1) the government contractor defense created by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); (2) the affirmative protections for damages caused by defective government contract specifications, as stated in *United States v. Spearin*, 248 U.S. 132 (1918); and (3) the law's general protection of subordinate contracting parties.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest association of businesses, companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 220,000 companies, trade and professional associations, and state and local Chambers of Commerce. It is the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court. The

Chamber seeks to advance those interests by filing briefs in cases of importance to the business community. Among the Chamber's constituencies is a core of businesses which contract with the United States.

The decision of the United States Court of Appeals for the Federal Circuit below has serious adverse implications for large and small corporations alike, because it would allow the government to avoid the consequences of its actions when it mandates production of potentially hazardous materials and products in support of the national defense and other government-sponsored objectives. The Federal Circuit's view of governmental responsibility for government actions, if upheld, would thrust upon private parties liability for doing the government's will. The Chamber believes it is important for this Court to recognize the significance of this issue to the business community.

Permitting tort liability which is the direct and proximate result of government requirements ultimately to be imposed on government contractors raises serious legal and constitutional concerns, since this liability is neither bargained for nor avoidable. In the Chamber's view, such liability is wholly inconsistent with the overarching legal principle that control over a contract equals responsibility for its consequences. It is also inconsistent with existing doctrines protecting government contractors from contractual and third-party tort liability for actions dictated by the government through mandatory contracts, and specifically inconsistent with the expressed will of Congress embodied in Section 707 of the Defense Production Act of 1950, 50 U.S.C. app. §§ 2061-2171 (1988 & Supp. V 1993) (the "DPA"). The Federal Circuit's crabbed reading of contract law and the government contractor defense is inconsistent with applicable decisions of this Court, and should therefore be reversed.[1]

---

[1] The petitioners and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

STATEMENT OF THE CASE

The facts in this action are set forth in greater detail in petitioners' brief and in the record below. However, several facts are important to understand the nature of the Chamber's concerns regarding the Federal Circuit's view of the government contractor defense and the DPA.

During the Vietnam War, the government ordered the petitioners to produce Agent Orange. While the petitioners had produced herbicides, they had not produced defoliants and were not fully informed of the potential dangers of Agent Orange, which they produced according to governmental fiat and government specifications. The government did not disclose the risks of Agent Orange to the petitioners.

In the late 1970s, petitioners (and other Agent Orange manufacturers) were sued by a class of Vietnam veterans. The class plaintiffs sought damages for health problems allegedly caused by exposure to Agent Orange.

After several years of discovery, the petitioners moved for summary judgment, arguing that the government contractor defense (which was later accepted by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)) precluded the class tort claims. Though the motion was initially granted by the original district court judge assigned to the case, Judge Pratt, that motion was withdrawn by Judge Weinstein, Judge Pratt's replacement on the district court, so that the issue could be determined at trial. *In Re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 424 U.S. 1004 (1988).

Faced with what the district court later termed "a possibility of an ultimate finding of liability with claims totalling billions of dollars," *In Re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 749 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988), the petitioners (and other Agent

Orange manufacturers) settled the class action at a cost to them of approximately $22 million (of a total settlement of $180 million).

Petitioners sought recovery of the settlement amount from the government in the Claims Court under the doctrine of *United States v. Spearin*, 248 U.S. 132 (1918), alleging unsuccessfully that the government had breached its warranty of specifications by ordering the manufacture of Agent Orange. The Claims Court also rejected petitioners' argument that they were entitled to relief under Section 707 of the DPA, which protects government contractors from liability for "damages . . . for any act or failure to act" resulting from DPA compliance. 50 U.S.C. app. § 2157 (1988).

The Federal Circuit, over the vigorous dissent of Judge Plager, affirmed the dismissal of petitioners' *Spearin* claims, holding that the government contractor defense would have provided petitioners an absolute defense to liability, and that therefore no damages were "caused" by the government. *Hercules, Inc. v. United States*, 24 F.3d 188, 200 (Fed. Cir. 1994).

The Federal Circuit also denied recovery under the DPA, holding that relief available under the DPA is limited to costs caused by giving priority to DPA contracts over private contracts. *Id.* at 202-04.

In dissent, Judge Plager argued that no one could have determined what the outcome of the application of the government contractor defense would have been. *Id.* at 207. Likewise, he attacked the majority's interpretation of the DPA as a "*non sequitur*" that ignored the language of the statute. *Id.* at 209-10.

The Court granted the petition for a writ of certiorari on April 3, 1995.

SUMMARY OF ARGUMENT

1. The history of the DPA demonstrates that Congress, recognizing the government's responsibility for the consequences of producing material for defense of the nation, intended to indemnify contractors. Section 707 of the DPA indemnifies the petitioners for the consequences of contracts entered into pursuant to the DPA, including damages in tort.

2. The Federal Circuit's misapplication of Section 707 is wholly inconsistent with existing protections for government contractors. The government contractor defense enunciated by this Court in *Boyle* shields government contractors from third-party tort liability for work performed pursuant to government contract specifications. The *Spearin* doctrine, which protects government contractors from the effects of faulty or harmful government contract specifications, provides a separate basis for the protection of government contractors performing the government's will. The Federal Circuit's analysis of Section 707 clashes with the reasoning of these important legal doctrines.

3. A review of closely-related, analogous settings within the law illustrates a fundamental principle: when a dominant party controls the terms, conditions, and method of performance in a contract of adhesion, it assumes responsibility for such control. In the law of adhesion contracts, control over a contract carries greater imposition of responsibility for its consequences. In the developing law of environmental liability, overweening government control over activities causing pollution also creates governmental liability.

4. The government compelled petitioners to produce Agent Orange and had exclusive power over all aspects of the contracts. As a matter of policy and economics, the government should not be allowed to escape its duty to indemnify the contractors.

ARGUMENT

This case concerns whether and to what extent the federal government may avoid liability for contracts which it has imposed upon private entities. Affirming the decision below would allow the government to escape the consequences of compelling petitioners to produce Agent Orange, which the government knew was potentially hazardous, dictating its content and labeling, and knowingly exposing service personnel to that substance.

Concomitantly, this case concerns the protections afforded to government contractors performing important and sometimes hazardous public policy goals. The protections afforded to government contractors are broader than the limited and internally inconsistent view of government contract indemnity adopted by the Federal Circuit.

While it is well-settled after this Court's determination in *Spearin* that the government warrants specifications it imposes in contracts, the Federal Circuit found that *Spearin* did not extend to indemnify the petitioners (which manufactured Agent Orange to government specifications) for the tort claims against them. Likewise, the court of appeals found that DPA Section 707 does not protect a contractor from tort liability caused by use of dangerous government specifications. The Federal Circuit then compounded its error by asserting that petitioners "voluntarily" failed to invoke the government contractor defense. None of these holdings survives scrutiny.

In sum, this case involves the misapplication of three doctrines that should work integrally to shield from liability government contractors doing the government's bidding: *Boyle*, which shields government contractors from third-party tort claims thorough a "shared immunity" with the government; *Spearin*, which provides an affirmative remedy to protect contractors from defective government specifications; and Section 707 of the DPA, which mandates that a contractor shall not be liable for "damages . . . for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or

order issued pursuant to this Act." These protections all have application in a setting in which the government maintains near-complete control over a contract of adhesion. Consistent with general contract principles, and legal principles in analogous cases involving the government, these protections place responsibility on the controlling party—the government.

The Federal Circuit failed to address the integral nature of these defenses, and held that the DPA provides no protection to the petitioners. As a result, government contractors are left defenseless when the government effectively seizes control of a private entity, then disclaims responsibility for the consequences of its seizure.

I. THE DEFENSE PRODUCTION ACT INDEMNIFIES THE PETITIONERS

As a concomitant of the broad powers it gives the government, the DPA provides contractors express protection from the consequences of compelled government contracts. This is clear from the history of the DPA and the language of the Act itself. Nevertheless, the Federal Circuit claimed to harmonize DPA Sections 101 and 707 when it stated that Section 707 provides no basis for indemnifying contractors for tort liability. The court of appeals cited no direct authority for this view, which conflicts with the text and the history of the DPA. To the contrary, the history of the DPA itself, as well as its interrelationship with the law concerning the government contractor defense and the contract protection against defective specifications, provide persuasive authority that the government must be responsible for the consequences of its compelled contracts.

A. History of the Defense Production Act

1. *Historical Development*

Grants of immunity and indemnity against third-party liability by the United States to its contractors are permitted by the authority conferred in the Constitution to

enter into contracts[2] and to exercise "War Powers."[3] When these two powers have fused, those who contract with the government for defense-related goods are protected from the consequences of the government's exercise of its political responsibilities,[4] particularly when the government has compelled the production.

Since before the First World War, Congress found it necessary to authorize the executive branch to compel production of goods. Congress recognized that contractors must be immunized or indemnified from liabilty which might grow out of less-than-voluntary contract performance.[5] Indeed, Congress has on other occasions also recognized the need to indemnify contractors facing performance risks. *See, e.g.*, 10 U.S.C. § 2354 (1994) (providing indemnification for contracts involving hazardous activities).

During the World War I era, Congress granted extraordinary powers to the executive branch to facilitate military mobilization. The National Defense Act of 1916 empowered the President in time of war or imminent war to place orders for products and materials required by the Army.[6] A similar act supported Navy procurement.[7] Compliance with these Acts took precedence over any other contract, and it was plain that these laws were intended to transform the normal process of commercial contracting into compelled undertakings. Neither act directly protected contractors from third-party liability:

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[2] *Dugan v. United States*, 16 U.S. (3 Wheat.) 172 (1818).

[3] *Lichter v. United States*, 334 U.S. 742 (1948).

[4] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[5] Willard H. Pedrick & Nora G. Springfield, *War Measures and Contract Liability*, 20 Tex. L. Rev. 71 (1949); Louis M. Brown, *The Effect of Conscription of Industry on Contracts for the Sale of Goods*, 90 U. Pa. L. Rev. 533 (1942).

[6] National Defense Act of 1916, ch. 134, § 120, 39 Stat. 166, 213.

[7] Act of March 4, 1917, ch. 180, 39 Stat. 1168, 1192, *re-enacted by* Act of July 1, 1918, ch. 114, 40 Stat. 704, 719-20.

both required only that the United States pay just compensation for conscripted goods.[8]

2. *World War II*

The contracting powers granted to the President during World War I expired at the cessation of hostilities. Thus, in 1940, when the situation in Europe required that the United States again mobilize for war, the President's special procurement powers were limited.

The National Defense Act of 1940 empowered the President, for two years, to require that contractors give priority to Army and Navy contracts or orders,[9] and was later amended to give the executive authority to require contractors to give priority to orders for materials deemed vital to the national defense.[10] Congress also expressly immunized contractors from liability for breach of contract damages resulting from the performance of priority orders.[11] The Selective Training and Service Act of 1940[12] gave the President authority to order necessary supplies or equipment for the Army or Navy.[13]

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[8] Some courts recognized that compliance with a compulsory order under the National Defense Act of 1916 excused the breach of a commercial contract, reasoning that sovereign acts had frustrated performance of the commercial contract. *See Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 F. 177 (2d Cir.), *cert. denied*, 253 U.S. 498 (1920).

[9] National Defense Act of 1940, ch. 440, § 2, 54 Stat. 676, 676.

[10] Act of May 31, 1941, ch. 157, 55 Stat. 236.

[11] *Id.* The legislative history of this provision recognized that manufacturers sued for damages had limited defenses to defaulted contracts, and "g[a]ve clear statutory protection to all manufacturers who comply with priority orders." H.R. Rep. No. 460, 77th Cong., 1st Sess. 6 (1941).

[12] Selective Training and Service Act of 1940, ch. 720, § 9, 54 Stat. 885, 892.

[13] *Id.* The authority conferred on the President by the Selective Training and Service Act of 1940 is identical to that of the National Defense Act of 1916.

Following the attack on Pearl Harbor, Congress enacted the First and Second War Powers Acts. The First War Powers Act authorized the President, when necessary to "facilitate the prosecution of the war," to permit an agency "exercising functions in connection with the prosecution of the war effort . . . to enter into contracts . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts" and regardless of the availability of appropriations.[14] The War Department relied on this broad grant of authority to assist contractors suffering financial losses and to indemnify contractors against damages arising from execution of government contracts.

The Second War Powers Act [15] again expanded the executive's power over defense contractors by giving the President authority to require *acceptance* of priority contracts or orders.[16] A contractor refusing contracts or orders faced criminal sanctions.[17] The Act expressly immunized contractors from liability for breach of contract.[18] Thus, the Act recognized that when the government exercised such complete control over contractors, the government, not the contractors, was implicitly responsible for the consequences to third parties.

The Second War Powers Act and the Selective Training and Service Act expired after World War II.[19] Concerned about the country's ability to meet foreign and domestic obligations,[20] Congress enacted the Selective

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[14] First War Powers Act, 1941, ch. 593, § 201, 55 Stat. 838, 839.

[15] Second War Powers Act of 1942, ch. 199, § 301, 56 Stat. 176, 177.

[16] *Id.* at 178.

[17] *Id.* at 179.

[18] *See L.N. Jackson & Co. v. Royal Norwegian Gov't*, 177 F.2d 694, 701 (2d Cir. 1949), *cert. denied*, 339 U.S. 914 (1950).

[19] Second War Powers Act of 1942, *as amended by* ch. 590, 59 Stat. 658 (1945); Selective Training and Service Act of 1940, *as amended by Act* of June 29, 1946, ch. 522, 60 Stat. 341.

[20] S. Rep. No. 1268, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. Serv. 1989.

Service Act of 1948, which authorized the President to place orders for articles or materials required by the military forces or the Atomic Energy Commission.[21] A contractor receiving orders under the Act was required to give them priority or face possible seizure of its plant and criminal sanctions.[22]

B. The Korean War and the Defense Production Act of 1950

The invasion of South Korea in 1950 thrust the United States into a military crisis which continued under the penumbra of the Cold War until the fall of the Berlin Wall in 1989.[23] In response to the sudden onset of the Korean War, Congress passed the Defense Production Act of 1950, which was in part derived from the emergency statutes enacted during World War II.[24]

Congress's principal purpose in passing the DPA was to provide material to the military in as short a time as possible without total disruption of a free economy.[25] DPA Section 101, 50 U.S.C. app. § 2071, again gave the President extraordinary powers to compel acceptance and performance of contracts vital to the national defense.[26]

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[21] Selective Service Act of 1948, ch. 625, 62 Stat. 604, 625-26.

[22] *Id.*

[23] We are now at the intersection of almost three-quarters of a century of war powers laws which created an array of product and environmental hazards with both expanded product liability litigation and a legislated compulsion to remediate environmental damage. Underlying this case is the question of whether the government, having provided for the national defense, will now meet the product liability and environmental consequences of the defense effort.

[24] *See Defense Production Act of 1950: Hearings on S. 3936 Before the Senate Comm. on Banking and Currency*, 81st Cong., 2d Sess. 199-200, 278-92 (1950) (side-by-side comparisons of World War II statutory language with proposed statutory language).

[25] S. Rep. No. 2250, 81st Cong., 2d Sess. 1 (1950).

[26] Defense Production Act of 1950, ch. 932, § 101, 64 Stat. 798, 799.

When contractors were compelled to perform military contracts or to take unusual risks during World War II, Congress indemnified and immunized them against liability for commercial contract defaults. By 1950, however, government contractors no longer had such protection. This void was filled by DPA Section 707, a new provision broadly immunizing contractors from "damages . . . for any act or failure to act resulting directly or indirectly from . . . compliance with . . . this Act." [27] The Senate report accompanying the DPA stated: "Section 707 contains an exculpatory clause protecting persons who have complied with the act against liability for damages thereafter." S. Rep. No. 2250, 81st Cong., 2d Sess. 11 (1950).

When Congress amended Section 707 for clarity in 1952, the Senate report accompanying the amendment again described Section 707 in broad terms:

> The first sentence of section 707 of the act contains the so-called exculpatory clause, which protects a person from liability, under contract or otherwise, as the result of compliance with the act or regulations issued under the act. This provision was included to encourage and assist people to comply with the act, even though it was recognized that common-law doctrines, such as frustration and impossibility of performance and the like, would cover many of the same cases.[28]

Accordingly, Section 707 places the responsibility for the consequences of compelled contracts squarely on the shoulders of the government, which controlled the terms and performance of the contracts.

C. Section 707 Immunizes Contractors from Liability for Damages in Tort or Contract

By its plain language, Section 707 shields a contractor from liability for "damages . . . for any act or failure to

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[27] *Id.* § 707, 64 Stat. at 818.

[28] S. Rep. No. 1599, 82d Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1789, 1818.

act" resulting from compliance with the DPA. This language could not be more encompassing: it contains no words of limitation.

In statutory construction cases, "when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). The lower court claimed to be reading this plain language when it denied recovery to the petitioners. On the contrary, it construed Section 707 in a manner that denies its plain meaning.

By its language, Section 707 immunizes a contractor from all liability resulting from compelled production, whether arising in contract, tort, or otherwise. There is no indication that Section 707 was intended to excuse only liability under contractual defaults, as the court of appeals held. Indeed, Congress rejected the explicit "liable . . . for any default under any contract" language of the predecessor in favor of the broader "liable . . . for any act or failure to act" language of Section 707. Had Congress intended such a limitation it could very easily and simply have re-adopted the prior language.[29] Instead, the plain language of Section 707 unmistakably expands upon the language of its statutory predecessors. Second, the references to Section 707 in the DPA's legislative history are wholly consistent with the proposition that the immunity language applies to all damages or claims, what-

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[29] *Compare* ch. 199, § 301, 56 Stat. 176, 180 *with* 50 U.S.C. app. § 2157. As previously noted, Congress has expressed no proclivity to limit indemnity to government contractors. To the contrary, Congress has not hesitated to protect government contractors from all the risks that result from government contract performance—even those that sound in tort. *See* 10 U.S.C. § 2354 (1994) (providing indemnification for contracts involving hazardous activities); Atomic Energy Damages Act, 42 U.S.C. § 2014 (1988 & Supp. V 1993) (authorizing indemnification of government contractors from nuclear risks); *see also* 48 C.F.R. § 52.228-7 (1994). The Federal Circuit's view was certainly not premised on considerations of congressional policy.

ever the legal basis. The House report stated: "This section [707] provides an exemption from damages or penalties which might result from compliance with rules, regulations, or orders issued under title I." [30] Similarly, the relevant Senate report stated: "Section 707 contains an exculpatory clause protecting persons who have complied with the act against liability for damages thereafter." [31] When Congress re-examined Section 707 in 1952, it stated that Section 707 "protects a person from liability, under contract or *otherwise,* as the result of compliance with the act or regulations issued under the act." [32]

In sum, the plain meaning, legislative history and historical context of Section 707 all demonstrate that Congress indeed intended Section 707 to immunize contractors from all damages resulting from compelled production. Congress recognized the level of government control over war time contractors was so great that it provided a means of protecting contractors from the results of compelled contracts with the government.

D. The Federal Circuit's Interpretation of the DPA is Wholly Inconsistent with *Boyle*'s Government Contractor Defense and with Indemnification of Contractors Following Government Specifications in *Spearin*

As stated previously, the other protections involved in this case are the government contractor defense set forth in *Boyle* and the warranty of adequate specifications elucidated in *Spearin*. The *Boyle* defense provides shared immunity to protect a government contractor from third-party tort claims. The *Spearin* doctrine indemnifies contractors from liabilities incurred due to reliance on government contract specifications. These protections share

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[30] H.R. Rep. No. 2759, 81st Cong., 2d Sess. 22, *reprinted in* 1950 U.S.C.C.A.N. 3620, 3644.

[31] S. Rep. No. 2250, at 11; *see* 96 Cong. Rec. 10,572 (1950).

[32] S. Rep. No. 1599, *reprinted in* 1952 U.S.C.C.A.N. at 1818 (emphasis added).

a common logical basis: that contracts of adhesion forced upon contractors in the pursuit of important governmental objectives should not be the basis of contractor liability. Section 707, which also protects government contractors performing mandated services for the government, should be construed similarly. When considered in relation to their common purpose, these protections provide indemnity for third-party tort liability, recovery in contract for reliance on government specifications, and, under the DPA, indemnification from all liabilities incurred as a result of the performance of the compelled contract.

The opinion of the Federal Circuit, however, rejected or failed to consider at all the common purpose of this trio of government contractor protections to hold that the DPA will not indemnify contractors for incurred liabilities. *See Hercules*, 24 F.3d at 204. This decision is not only inconsistent with the DPA's text and history, but also with *Boyle* and *Spearin*.

1. *Boyle v. United States*

In *Boyle*, this Court held that a contractor manufacturing products for the government is not liable in tort to third parties if:

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

487 U.S. at 512.[33] These three elements are approval, conformance, and relative knowledge.

The first two elements of the test tie the production of the product to the government's demands. "[A] product

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[33] The Chamber of Commerce, as amicus curiae in *Boyle*, supported establishment of the government contractor defense. *See* Brief for the Chamber of Commerce of the United States as Amicus Curiae, *Boyle v. United Technologies*, 487 U.S. 500 (1988) (No. 86-492).

conforms to reasonably precise specifications if it satisfies an intended configuration even if it may produce unintended and unwanted results." *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir. 1989) (internal quotations omitted), *cert. denied*, 495 U.S. 953 (1990). The contractor satisfies the third element by proving the government knew of (or at least the contractor did not conceal) a danger. *Boyle*, 487 U.S. at 512; *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 951 n.10 (4th Cir. 1989). The fundamental assumption of these cases is shared immunity in the accomplishment of distinctively governmental objectives. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940) (no liability for contractor doing government's will).

2. *United States v. Spearin*

In *Spearin*, this Court stated that, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." 248 U.S. at 136.

To succeed on an implied warranty claim, the contractor must show: (1) government specifications, (2) with which the contractor complied, and (3) an unsatisfactory result. *R.C. Hedreen Co.*, ASBCA No. 20,599, 77-1 BCA ¶ 12,328, at 59,555.

It is significant that the Court's first application of the government contractor defense was actually premised on the same issues set forth in *Spearin*, i.e., defective government specifications. In *Yearsley*, 309 U.S. at 20-21, the Supreme Court concluded a contractor had no liability for riparian damages caused in performance of a government contract, because there was "no liability on the part of the contractor for executing [the government's] will." In doing so, the Court effectively created a bridge between the logic of the contract-based affirmative relief in *Spearin*, and the logic of more broadly based government contractor

relief as ultimately expressed in *Boyle* and Section 707.[34] The Federal Circuit's decision is inconsistent with this important historical development.

3. *The Lower Court Misapplied* Boyle, Spearin, *and the DPA*

In the instant case, the Federal Circuit held that the petitioners had successfully argued three times that the government contractor defense applied, and therefore concluded that the petitioners faced no real liability. *Hercules*, 24 F.3d at 199. This argument is flawed since the government contractor defense several years prior to *Boyle* was not nearly as developed or certain as it is today. Petitioners argued the government contractor defense, but they simply did not win. *See William T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 21 (1992), *aff'd sub nom. Hercules, Inc. v. United States*, 24 F.3d 188 (Fed. Cir. 1994) (discussing the reasons for settlement). What occurred in settlement—a payment to lay to rest billions of dollars of potential liability—was not a giveaway by some gratuitous abandonment of a sure defense, but rather a recognition that the government contractor defense was uncertain.[35] Because of this uncertainty (fanned by government hostility to the defense) the government contractor defense did not guarantee an escape from liability as

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[34] Likewise, in *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965), the court found that a contractor who failed to take precautions to prevent damages during performance of a dredging contract was not liable, since "[t]he Government did not provide for such additional precautions in the plans, and [the contractor] is not to be held liable for this omission."

[35] Although the Agent Orange court (then Judge Pratt), in what was the first "modern" expression of the concept, originally accepted the application of the government contractor defense to this case, the court thereafter (then Judge Weinstein) refused to enter judgment on this basis until there was a class settlement. Moreover, the government—a party to the case—vigorously *opposed* the government contractor defenses. *See id.* at 34-35.

the court of appeals claims. The petitioners faced significant liability under their Agent Orange contracts and were forced to pay damages.

That is precisely where the DPA (and the *Spearin* doctrine) come in. As even the Federal Circuit recognized, the Agent Orange contracts were imposed upon the petitioners through the DPA; they were forced to produce what the government demanded, and they thereafter suffered "liability, under contract or otherwise, as the result of compliance with the act." S. Rep. No. 1599, *reprinted in* 1952 U.S.C.C.A.N. at 1818-19. As such, petitioners are entitled to protection from the consequences of their compliance with government demands.

Unfortunately, rather than reading the DPA, the government contractor defense and the *Spearin* doctrine together as projecting a single public policy, the Federal Circuit read them as providing different and inconsistent bases for relief. *See Hercules,* 24 F.3d at 197. However, as the Chamber of Commerce has shown, these three doctrines have a common purpose and must be read together rather than fragmented. The understanding of a larger objective is necessary in order to fulfill Congress's expectation that contractors doing the government's bidding should not bear costs imposed by the government's decisions. This is in line with the law's mandate that the party compelling the terms and conditions of a relationship with another must protect that party.

II. THE LAW RECOGNIZES THE RESPONSIBILITY OF THE DOMINANT CONTRACTING PARTY FOR THE CONSEQUENCES OF ITS POSITION RELATIVE TO THE SUBORDINATE CONTRACTING PARTY

In the instant case, the government has sought to avoid its responsibility to indemnify the petitioners under contracts it imposed and controlled pursuant to the DPA. Such avoidance is inconsistent with the government's belated position that contractors are protected against lia-

bility for contracts with the government under *Boyle*.[36] However, it is consistent with the government's attempts, in this forum and in many others, to avoid the costs of its past decisions, costs which in many cases are only now becoming clear.

This should not be permitted to happen. The government is and must be responsible for the effects of contracts it forces upon private entities in pursuit of public policy goals. The quid pro quo for the government's determination that national security demands compliance with rated orders is to protect the contractors who perform those orders from the consequences of doing so, regardless of whether the claims against them sound in negligence, strict liability, or otherwise. As shown below, where one contracting party exerts a high degree of control over another, that party must bear the cost and the responsibility for its actions.

The discussion of this concept begins with the general contract law principle of the adhesion contract, the functional equivalent of the contracts in the instant case. In the case of government contracts, the relationship between the government and the contractor is defined by the government's overwhelming power. The relationship does not reflect the consensual agreement of the parties, but rather the government's nonnegotiable demands and the con-

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[36] In the original Agent Orange litigation, the government attacked the government contractor defense, which it then championed to the Federal Circuit in this case. This discrepant invocation of the defense could also be estopped under the doctrine of inconsistent positions. When "the party against whom estoppel is invoked received some benefit from the previously taken position, i.e., he 'won' because of it and he seeks to 'win again' from his original adversary (or one in privity with that person or involved in the same transaction) on a basis which contradicts the prior position," the doctrine will apply. *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1578-80 (Fed. Cir. 1984). Litigants are to be discouraged from playing " 'fast and loose' with the judicial process." 1B James W. Moore et al., *Moore's Federal Practice* § 0.405[8], at III-55 (2d ed. 1994); *Scarano v. Central R.R. of N.J.*, 203 F.2d 510 (3d Cir. 1953).

tractors' submission. A frank recognition of the disparity of power in the relationship leads to the conclusion that government contracts typically are contracts of adhesion.[37]

A. Contracts of Adhesion Are Construed Against the Dominant Drafting Party

It is fundamental to contract theory and interpretation that the parties to an agreement must have the freedom to initiate and negotiate. Such freedom is necessary to bind the parties to the terms of a contract. In this way, the law gives binding effect to the inalienable right of individual liberty. At its core, a binding contract is a private, mutual matter between parties who are free to negotiate terms and conditions.

Contracts of adhesion are generally not private affairs, but reflect a social institution where standard forms are used among parties of unequal bargaining power on a take-it-or-leave-it basis. These contracts are not the result of free bargaining. Accordingly, contracts of adhesion are not viewed through the lens of the traditional common-law rules of contract. *See generally* Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173 (1983). Instead, their terms are subject to judicial scrutiny for reasonableness and "fundamental fairness." *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991).

B. Terms in Contracts of Adhesion Can Be Rewritten

There are several remedies for parties subjected to oppressive terms in contracts of adhesion. Courts may strike the entire contract. Alternatively, a court may reform the contract by striking the offending provision, allowing the reasonable expectations of the parties to prevail, amending the contract so that it is objectively fair, or substitut-

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[37] *See* Gilbert A. Cuneo & Eldon H. Crowell, *Impossibility of Performance—Assumption of Risk or Act of Submission?*, 29 *Law and Contemporary Problems: Government Contracts Part II*, 531, 548-49 (1964). The authors conclude that "[c]onditions and clauses in a government contract are on a take-it-or-leave-it basis; there is no freedom of choice." *Id.* at 549.

ing boiler-plate or statutory rules. *See generally* 3 Lawrence A. Cunningham & Arthur A. Jacobson, *Corbin on Contracts* § 559A & C (West Supp. 1994) (hereinafter "Corbin"); *see also, e.g., T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 377 n.90 (5th Cir. 1980) (imputing contractual terms only in contracts of adhesion). "The terms of a contract of adhesion must be reasonably adapted to advance a legitimate purpose of the party that drafted the contract." *Melso v. Texaco, Inc.*, 532 F. Supp. 1280, 1298 (E.D. Pa.), *aff'd mem.*, 696 F.2d 983 (3d Cir. 1982).

C. Allowing the Dominant Party to Avoid Liability Contravenes Fundamental Fairness and the Reasonable Expectations of the Parties

Where contracting parties are freely allowed to negotiate over terms, they are able to give voice to their reasonable expectations. Parties may allocate the risk of consequential damages as they see fit, and the "price" of the contract will reflect the mutual agreement.

In the instant case, however, as with most adhesion contracts, the contractors did not have the option of adjusting the price for greater security. In fact, the contract prohibited the petitioners from protecting themselves in their normal manner of business. For example, the contractors were not allowed to place warning labels on the canisters of Agent Orange and were forced to follow government specifications.

In precluding petitioners from protecting themselves, the government created a circumstance analogous to instances in which a party with greater power than his counterpart drafts a contract of adhesion exculpating himself from liability. Courts routinely strike down exculpation clauses where the draftee is not afforded an opportunity to insure against or otherwise avoid risk. Corbin, *supra*, § 559F (listing cases). Thus, courts will not allow a party with the control over a contract to draft the contract so as to avoid all responsibility for the consequences thereof.

D. No Waiver of Liability Exists for the Government for the Consequences of Its Actions

In this case, fundamental fairness requires that the government not be allowed to exculpate itself from liability or avoid making the contractors whole. Just as if the government had explicitly written in terms to the contracts that disclaimed all liability, the prior rulings in these cases insulate the government from its own conduct. As a matter of fundamental fairness, therefore, the contracts should be reformed to meet the *reasonable* expectations of the parties.

The petitioner-contractors in this case had several reasonable expectations. First, they expected the government to act with candor in requiring the production of Agent Orange. Although the government was in a far better position to assess the potential risks of dioxin, those risks were not disclosed to the contractors. Worse, the government expressly prohibited the contractors from including *any* warning labeling. Yet the government seeks to pass those risks on with impunity. Second, the contractors reasonably expected that the government contract was for a defoliant, and not for, as the Vietnam veterans claim, an instrument of chemical warfare.

Finally, the contractors reasonably expected that should there be consequential damages as a direct result of the government's requirements, the contractors would be made whole because of the protections created by the DPA, *Spearin*, and the (then not-fully-certain) government contractor defense.

Likewise, the government could not have *reasonably* expected that it could design a defoliant with mandated specifications, demand that no warning labels be affixed, draft an agreement encompassing purchase terms as the government saw fit, compel contractors to sign the agreement, and then disclaim all liability for the defoliant. Nothing is reasonable about such expectations.[38]

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[38] Even if this Court does not enforce the reasonable expectations of the contractors, the Court should not enforce the effect

Adhesion contracts are, in and of themselves, virtually unconscionable. *See Harper Tax Servs., Inc. v. Quick Tax Ltd.*, 686 F. Supp. 109, 112 (D. Md. 1988). The essence of unconscionability is "one of prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." *Id.* at 113 (alteration in original) (quoting New York Uniform Commercial Code § 2-302 comment 1 (McKinney 1964)). This case is about oppression, unfair surprise, and the lack of an ability to allocate risks. The contractors were forced to assume all of the risk, and as a result, have suffered substantial damages. "Fairness in the private law-making process also requires that drafters of adhesion contracts to [sic] tailor their contracts so as not to impose a greater burden on the stuck party than justified by their fair purposes." Corbin, *supra*, § 559G. Accordingly, the effect of the government's attempt to limit its damages is unconscionable and should be stricken.

E. The Agent Orange Contracts Were Adhesive

The government clearly has the power to impose contracts entirely against the will of a private party. Contracts of adhesion such as the contracts at issue here are " 'sold not bought.' The one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather." *Schwartz v. S.S. Nassau*, 345 F.2d 465, 471 (2d Cir.) (quotation omitted), *cert. denied*, 382 U.S. 919 (1965); *see also* Rakoff, *supra*, at 1173.

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of these adhesion contracts. Instead, the Court should strike the offending effect of the adhesion contracts and substitute the statutory rules regarding damages. For example, section 2-719(3) of the Uniform Commercial Code provides:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

U.C.C. § 2-719(3) (1989).

The Agent Orange contracts were compulsory, not voluntary, and therefore were contracts of adhesion. The government drafted the contracts pursuant to the DPA and supplied all specifications. The contractors had no power to determine whether to produce Agent Orange. Indeed, the contracts at issue cannot even be said to have been let merely on a take-it-or-leave-it basis, but on a "take-it-or-go-to-jail" basis. Petitioners had to produce what the government demanded. Petitioners' acceptances of the contracts at issue were not acts of negotiation, but of submission. The government's high degree of control over the contracting process imposes upon it the responsibility, and therefore the costs, of the damages its actions caused.[39]

This enormous disparity in contracting power illustrates the rationale for the indemnity provision of DPA Section 707. The contractors had no true options; they were ordered to produce what the government demanded, *see Hercules*, 24 F.3d at 191, and the dangers were

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[39] Moreover, the government's decisions in the context of wartime deployment involve balancing the defense needs of the nation against the risks to citizens. Such inherently political determinations are nonjusticiable. *Baker v. Carr*, 369 U.S. 186, 226 (1962). As this Court recognized in *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."

From the basic concept that military decisions are nonjusticiable flows the principle that in a government contracts case addressing compelled production of a military product, "[n]o trier of fact can reach the issue of [the] manufacturing defect without eliminating other variables which necessarily involve political questions." *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) (political question doctrine rendered manufacturing defect claim against a manufacturer whose missile allegedly malfunctioned and killed servicemen nonjusticiable because claim required judicial investigation into military strategy). Hence, as the claims in this case would require judicial inquiry into wartime government decisions regarding military materiel, the issues in this case are nonjusticiable.

known solely to the government. The contractors were not in a position to protect themselves. *See William T. Thompson*, 26 Cl. Ct. at 20-21 (Thompson had no input regarding Agent Orange specifications and government's level of knowledge exceeded Thompson's). In this circumstance, petitioners' contracts of adhesion with the government should not be invoked against them.

III. THE GOVERNMENT HAS ATTEMPTED TO AVOID LIABILITY FOR THE ENVIRONMENTAL CONSEQUENCES OF ITS WARTIME CONTRACTS

The instant case is not the only one in which the government has sought to avoid responsibility for the consequences of contracts forced upon contractors. Courts have found responsibility, and therefore liability, based upon control over the contracting process in the context of environmental law. In several cases, the government has sought to avoid responsibility for its actions under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607 (1988), just as it has under the DPA; *see Elf Atochem N. Am., Inc. v. United States*, 868 F. Supp. 707, 712-13 (E.D. Pa. 1994) (rejecting government's contention that World War II era pollution at chemical plant could not implicate the government under CERCLA; cleanup liability imposed).

CERCLA imposes liability upon those who have the actual responsibility for, or in some cases, the mere authority to control, disposal of hazardous waste. *See generally* 42 U.S.C. § 9607; *compare Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994) (plaintiff must allege defendant "directly and personally" engaged in the acts causing environmental damage) *with Nurad, Inc. v. William E. Hooper & Sons*, 966 F.2d 837, 842 (4th Cir.) (individuals "need not have exercised actual control in order to qualify as operators under § 9607(a)(2), so long as the authority to

control the facility was present"), *cert. denied*, 113 S. Ct. 377 (1992).[40]

The government's attempts to avoid owner-operator liability under CERCLA are highlighted in *FMC Corp. v. United States Department of Commerce*, 29 F.3d 833 (3d Cir. 1994). *FMC* involved World War II contracts for the production of synthetic rubber to aid the United States war effort. The production took place at plants over which the government exerted considerable control. As in the instant case, the government used its wartime powers to compel production. *FMC Corp. v. United States Dep't of Commerce*, 786 F. Supp. 471, 474-75 (E.D. Pa. 1992).

Years later, the Environmental Protection Agency sought to recover cleanup costs at the plant from a subsequent owner, FMC Corporation. FMC sought contribution from the government under CERCLA, claiming the hazardous waste was due to wartime government contracts.

In a divided en banc opinion, the Third Circuit held that the government had waived sovereign immunity to liability under CERCLA, and that given the extent of government control over the facility, it shared cleanup liability. The court concluded "the leading indicia of control were present, as the government determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold." FMC, 29 F.3d at 843.

In responding to the government's claim that a finding of governmental liability would result in costs far in excess of anything Congress could have intended under CERCLA, the *FMC* court noted, "we point out that at bottom our result simply places a cost of the war on the United States, and thus on society as a whole, a result which is neither untoward nor inconsistent with the policy

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[40] As *Pipefitters* and *Nurad* demonstrate, there is a circuit split concerning the definition of control under 42 U.S.C. § 9607(a)(2).

underlying CERCLA." *Id.* at 846; *see also Elf Atochem*, 868 F. Supp. at 712-13.[41]

Just as the degree of government control over petitioners mirrors that found in *FMC*, the government's attempts to avoid liability in *FMC* are analogous to its actions here. In the instant case, the government, through the DPA, required production of Agent Orange, determined what Hercules and Thompson would produce, set the level of production, and directed its marking and distribution.

Because the government controlled Agent Orange production, it is just that the United States bear the responsibility for and costs of the consequences of its policies under these contracts. To allow the government to avoid the responsibility for its actions would be neither fair nor consistent with the DPA and its underlying policy.[42]

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[41] In different factual circumstances, the government avoided CERCLA liability by arguing that it had insufficient control to be liable as an operator or arranger at a former Hercules Agent Orange plant. *See United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995), *petition for cert. filed*, 63 U.S.L.W. 3707 (U.S. Mar. 21, 1995) (No. 94-1557). While finding the rated contracts issued to Hercules were "substantially dictated by [the government]," *id.* at 806, the court of appeals also found that the contracts did not address disposal of wastes, and that actual government involvement at the facility was "sporadic and minimal," *id.* at 811. The *Vertac* court also adopted the Federal Circuit's view that the DPA does not provide general indemnity for government contractors. *Id.* at 812.

[42] Another example of the government's responsibility for the consequences of compulsory contracts is found in the context of condemnation law. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The rationale of that clause is wholly consistent with and supportive of petitioners' claims under *Spearin* and the DPA, in that in each situation the party subject to injury as a result of government action is entitled to be made whole.

IV. PUBLIC POLICY REQUIRES THE GOVERNMENT TO BEAR THE CONSEQUENCES OF ITS OWN DECISIONS

Under the War Powers and Defense Production Acts, the government has extraordinary power to compel contractor compliance with public demands. Because of these powers, the freedom to negotiate is missing. As the Federal Circuit itself recognizes, "the Government routinely grants itself privileges—like the right to terminate a contract for the Government's convenience without penalty—that are not available to other contracting parties." *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072, 1079 (Fed. Cir. 1993) (Plager, J., concurring). There can be no pretense that the contracts at issue were bargained for and executed with equal bargaining power on both sides—rather, the law and the facts surrounding them suggest they were in fact contracts of adhesion.

Fundamental fairness requires that the government not be permitted to escape liability for damages suffered by contractors through third-party tort actions arising directly out of obligations imposed because of such contracts.[43] The rulings below wrongly insulate the government from the consequences of its conduct. The contractors reasonably expected to be protected from liability that arose through the contracts—by the *Spearin* doctrine for contract claims, by the *Boyle* government contractor defense for third-party tort claims, and by DPA Section 707 for other liabilities incurred in contract performance. These reasonable expectations are being frustrated by the government's attempt to avoid responsibility for the consequences of actions it required the petitioners to take. Petitioners had to produce what the government wanted, according to the government's terms. The petitioners effectively lost the right to their physical plant, the choice

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[43] This Court has stated "where the contract is one of adhesion, where there is great disparity in bargaining power, . . . other legal consequences may ensue." *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972).

of whether or not to engage in business, and the choice of what to produce.[44] Were it not for the protection provided by *Spearin*, *Boyle* and Section 707, these actions would violate the Fifth Amendment prohibitions against government seizure of private property without just compensation.

In sum, that the government may not force private entities to bear the costs of public benefits is basic to democratic government. As one of the founders observed, "[g]overnment is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government which *impartially* secures to every man, whatever is his *own*." James Madison, *Property* (1792), *reprinted in* 6 *The Writings of James Madison* 101, 102 (Gaillard Hunt ed., 1906), *quoted in Winstar Corp. v. United States*, 25 Cl. Ct. 541, 548 (1992), *rev'd, petition for reh'g en banc accepted, vacated*, 994 F.2d 797 (Fed. Cir. 1993).

To view Section 707 as permitting the government to force liability, as well as production, upon a contractor is inconsistent with its historical meaning and with other doctrines protecting contractors, and offends basic notions of the sanctity of property. For constitutional as well as legal reasons, the Federal Circuit's decision that the DPA protects a contractor only against third-party breach of contract claims is unsound.

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[44] In this regard, *see Holodnak v. Avco Corp.*, 514 F.2d 285, 289 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975) (government insinuated itself to such an extent into business of contractor that it was a "joint participant" in contractor activities).

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully requests that this Court reverse the decision of the Federal Circuit and remand this action for further proceedings.

Respectfully submitted,

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Dated: June 19, 1995

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